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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-976

TED F. DUNHAM, JR., *ET AL.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

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INTRODUCTION

Pursuant to Rule 24, Rules of the United States Supreme Court, petitioners submit this response to the Brief of the United States in Opposition.

ARGUMENT

I. DECISIONS ALLOWING APPEAL OF CONDITIONAL RELEASE ORDERS ARE INAPPLICABLE

To avoid both the conflict between the circuits on the finality of new trial orders in collateral proceedings and the conflict of the ruling below with decisions of this Court, the Government now, for the first time, seeks to equate the District Court's order in this case with the conditional release orders[1] involving persons who have been convicted of crimes in state courts. But the instant order in both form and substance cannot in any way be said to be a conditional order of release; it is instead an interlocutory order of a new trial. Therefore, the cases cited and relied on by the Government are wholly inapposite. Indeed, the Fifth Circuit itself recognized that a conflict might exist when it expressly declined to follow the Second Circuit's decision in *United States v. Bishopp,* 286 F.2d 320 (2d Cir. 1961).

Contrary to the Government's contention, the Second Circuit has repeatedly endorsed a view on appealability of new trial orders which is both consistent in itself and diametrically opposed to the position adopted by the Fifth Circuit. Where new trial orders have been involved, the Second Circuit has held that they are interlocutory and non-appealable in collateral proceedings. *United States v. Bishopp, supra; United States v. Curran,* 18 F.2d 953 (2d Cir. 1927). On the other hand, it has permitted appeals

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[1] In the Petition for a Writ of Certiorari at 11 N. 6, the individual petitioner stated that the question of whether conditional orders of discharge were appealable was neither presented nor encompassed by the issue here.

from conditional orders of release which terminate the proceedings. *United States v. Smith*, 306 F.2d 596 (2d Cir. 1962); *United States v. Follette*, 358 F.2d 922 (2d Cir. 1966); *United States v. Zelker*, 466 F.2d 1092 (2d Cir. 1972). These holdings are not inconsistent – in one case the proceeding continues and in the other it terminates. A comparison of the *Smith* order with the instant order illustrates the differences. In *Smith, supra*, the order provided for the discharge of the prisoner, but stayed the release for the thirty days to enable the state to take steps for a new trial. When the state decided not to retry, the prisoner was released; the matter was terminated on the merits and the case was ripe for appeal. By contrast, the order here simply says "The judgment of conviction and the sentences imposed upon Ted Dunham are hereby vacated and a new trial is ordered." (J.A. 191). Hence, there has been no termination on the merits nor is there any provision for discharge under any circumstance.

Nowhere in the "most recent Second Circuit decisions" cited at Page 10 of the Government's Brief, do we find any basis for the Government's prediction that that Circuit "would have reached the same result as the Fifth Circuit, had the instant case been presented to it for decision."

II. THE JURY FOUND PETITIONERS GUILTY OF NON-EXISTENT OFFENSES; JUDICIAL APPROVAL AND UTILIZATION OF THE FAULTY VERDICT FORMS MAKES THE ORIGIN OF THE WORDING IRRELEVANT.

It is not disputed that the verdicts as to which the Dunham defendants were found guilty, do not describe any "offenses" denounced by Congress. The Fifth Circuit, by

undertaking to probe the minds of the jurors, concluded that the Jury really intended to find petitioners guilty of offenses different from those set forth on the verdict forms. This conclusion is squarely contradicted by the record. The trial court read the verdict to the jury and instructed it to take the forms to the jury room (J.A. 141). After deliberation, the verdicts were signed by the Foreman (J. A. 57) and filed with the clerk (J.A. 147). The court instructed (J.A. 146):

> "I think you should consult with one another right in the jury box and *advise me as to the verdict as reported on the form* is the verdict that you have finally agreed [sic]. Is that your verdict?" (emphasis added)
>
> FOREMAN & PANEL ALL SAY "YES."
>
> Again, the court said, "Mr. Clerk, read the verdict of the Jury."
>
> (Clerk reads verdict which is on file and the Jury, at the request of defendants' counsel, is polled and all 12 jurors signify in the affirmative that is their verdict.) (J.A. 147).

These facts inevitably lead to the conclusion that the verdict shown on the verdict form accurately reflected the findings of the Jury and negate a conclusion that the Jury intended to convict for different offenses.

In reversing the order for a new trial, the Court of Appeals placed great reliance, as does the Government's Brief, upon the affidavits of Messrs. Ruane and Carriere, two of Government's trial counsel, to support the claim that Dunham's trial counsel prepared the faulty verdict forms and persuaded the trial court to adopt and approve them over the objections of Government counsel, so that Dunham

must now suffer the consequences. Both that opinion[2] and the Government's Brief carefully avoid coming to grip with the trial court's own acceptance of the responsibility for the error.

Insofar as the trial court was concerned it was of no moment as to whether or not defense counsel "authored" the "ambiguous verdict form" since the Court "approved" it and "it is the petitioner himself who will serve a jail sentence." (App. 23a). Thus, that Court candidly recognized that once it adopted, approved and presented the verdict form to the Jury, that verdict form became the Court's own document, regardless of the source of the wording.

Moreover, implicit in the Court's Memorandum Opinion is the thought that irrespective of responsibility for an error of this magnitude, whether it be defense counsel's, the Court's or both,[3] Dunham should not be penalized by having to serve a jail sentence. We submit that the trial court's conclusions were correct and neither the Fifth Circuit's Opinion nor the Government's Brief have cited any precedent or reasons why those conclusions are not dispositive of the issue.

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[2] The opinion sidesteps this issue with a single sentence: "Unaccountably, the Court adopted it [the verdict form] as presented and sent it out with the jury." (App. p. 7a).

[3] Moreover, the Government itself bears heavy responsibility for the confusion. After defeating the Motion to Dismiss Count Three on the grounds that it "makes no reference to a conspiracy" nor made any mention of an "agreement" (J.A. 207-8, 58), the Government tried Count Three on a conspiracy theory (J.A. 169, 170) and the trial court, at the request of the Government, gave a "combination and conspiracy" instruction to the Jury (J.A. 128) as to that Count.

Instead, relying on the Carriere and Ruane affidavits, the Fifth Circuit Opinion and the Government's Brief seek to impose sole responsibility on Dunham's defense counsel. Petitioner submits that such affidavits should be given no weight for the following reasons:

(A) It is improper to consider *ex parte* affidavits on disputed factual issues in a Section 2255 proceeding, *United States v. Hayman*, 342 U.S. 205, 219-223 (1952), particularly where (1) the allegations of the affidavits are inconsistent with the record; and (2) opposing counsel was denied, as here, an opportunity to answer these affidavits (see, Fn. 8, p. 8 of Petition).

(B) Both affidavits, which state that Government counsel strongly objected to the proposed wording as to Count Three at an unreported conference with the Court, are inconsistent with the reported record. After the Court had read the verdict forms to the Jury and instructed the Jury to take the forms with it to the Jury room, the Court asked: "Now, are there any objections?" to which the Government responded: "No objections, Your Honor" (J. A. 141-2). Whatever was said at an unreported conference the Government did not choose to make its objection a matter of record when the Court asked if there was any objections to the verdict forms.

(C) Without questioning the veracity of affiants, we point out that the affidavits are based solely on memory and relate to an event which occurred some thirty months before the affidavits were made. After such a passage of time, the affiants even disagreed as to the date when the Judge's conference was held.

(D) Nowhere in the affidavits does the Government even claim that its counsel objected to the verdict form adopted and approved by the trial Court as to Count Five.

The Trial Court, which was intimately familiar with all of the circumstances, concluded:

> ". . . It is difficult to imagine circumstances as repugnant to the principles of due process as these. When the variance between the jury verdict and the count as set forth in the indictment is aggravated by the fact that the verdict recites activity not constituting a crime, the burden of showing that the verdict affords a sound basis for a valid judgment rightfully lies with the government." (App. 20a, 21a).

By contrast, the Fifth Circuit nullifies the foregoing conclusion by finding "that the error in wording of this form for recording the verdict did not contribute to Dunham's conviction, . . ." and second-guessing the Jury by the application of abstract logic and concluding that the Jury really intended to find violations different from those shown on the verdict sheet.

How can anyone say with assurance that the error in wording did not contribute to the conviction when the Court itself read the verdict forms to the Jury, sent the forms to the Jury room and again specifically called the forms to Jury's attention when they were reporting their findings? But even more unsupportable is the Court of Appeals' substitution of its own views in place of the actual findings of the Jury. In short, the Fifth Circuit opinion has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision (Rule 19, 1(b)).

This is particularly so, since petitioner Dunham is now incarcerated and stands convicted of having engaged in a conspiracy with Partin, but Partin is not guilty of a conspiracy with Dunham. Even if Partin is retried, as the Government indicates (Pg. 2, Government's Brief), this manifest injustice cannot be rectified insofar as the Sherman Act is concerned. A new Partin trial will in no way relate to any Sherman Act charges as Counts One, Two and Three have heretofore been dismissed as to Partin on the grounds that the evidence was insufficient to sustain a conviction.[4] *United States v. Partin*, 1972 CCH Trade Cas. ¶73,999 (N.D. Ga., 1972).

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[4] Since the Fifth Circuit has correctly noted that without the testimony of two witnesses (one suffering from "auditory hallucinations" and both self-admitted perjurers) "the prosecution has no case on Count 5" it is highly unlikely that Partin will be convicted if he is retried on Count Five, the Hobbs Act charge. *United States* v. *Partin, supra*, 493 F.2d 750, 760, 763 (5th Cir. 1974).

CONCLUSION

For the foregoing reasons petitioners request that the Petition for Writ of Certiorari be granted and that the individual petitioner be released from prison pending a final disposition of the matter by this Court.

Respectfully submitted,

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